among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that the Respondent, as representative of all employees in an appropriate unit, engaged in bargaining with the Charging Company and agreed upon terms of a contract governing wages, hours, and conditions of employment, and thereafter refused to execute the formal document incorporating these terms, and having found that the Respondent Union has thereby engaged in certain unfair labor practices, the Trial Examiner will recommend that it cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act. It will therefore be recommended that the Respondent Union, upon request, execute and sign, as the representative of the Charging Company's employees in the foresaid unit, the labor agreement tendered to them on or about February 18, 1963, if the Company so desires; and upon the Company's request, at an appropriate time, bargain with it for a new agreement, and, if an understanding is reached, embody such agreement in a signed contract.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, the Trial Examiner makes the following:

CONCLUSIONS OF LAW

1. International Brotherhood of Pulp, Sulphite and Paper Mill Workers, AFL–CIO, Local No. 61, is a labor organization within the meaning of Section 2(5) of the Act.
2. Groveton Papers Company is an employer within the meaning of Section 2(2) of the Act.
3. An appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act consists of: all employees of the Charging Company employed in the yard, woodroom, sulphite mill, bleach plant, filterroom, steampower, machine shop and stockroom, pipe shop, electrician department, construction department, print shop, converting department, and garage department, but excluding all supervisors as defined by the Act.
4. By virtue of Section 9(a) of the Act the above-named labor organization has been since August 31, 1962, and now is, the exclusive representative of all employees in the said appropriate unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment and other terms and conditions of employment.
5. By refusing, since on or about October 18, 1962, to bargain collectively in good faith with the said Charging Company, the Respondent Union has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(3) of the Act.
6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended order omitted from publication.]

Longhorn Transfer Service, Inc. *and* General Drivers, Warehousemen and Helpers Local Union No. 968 affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. *Case No. 23–CA–1523. October 2, 1963*

DECISION AND ORDER

On June 11, 1963, Trial Examiner George L. Powell issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and

recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Intermediate Report. The Trial Examiner also found that the Respondent had not engaged in certain other unfair labor practices and recommended that the complaint be dismissed as to such allegations. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman McCulloch and Members Leedom and Fanning].

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report and the entire record in the case, including the Respondent's exceptions and brief, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

The Board adopts as its Order the Recommended Order of the Trial Examiner.[1]

[1] We note that because of the nature of the unfair labor practices the Trial Examiner, in section V of the Intermediate Report, recommended a "broad" Order, but that section 1(e) of the Recommended Order and the fifth subparagraph of the notice are drafted in "narrow" terms. Accordingly, the Order and the notice are hereby corrected by deleting the words "like or related" and substituting the word "other" in the above-mentioned places.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

This proceeding, under Section 10(b) of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*), herein called the Act, began with the filing of a charge on November 14, 1962, by the Charging Party, alleging that Respondent had violated Section 8(a)(1) and (3) of the Act by certain specified activities, and, with all parties represented, was held before Trial Examiner George L. Powell in Houston, Texas, on March 14 and 15, 1963, on complaint of the General Counsel and answer of the Respondent.[1]

The issues in the case are: (1) Whether Respondent independently violated Section 8(a)(1) of the Act: (a) by urging an employee to persuade fellow employees to refrain from union activities; (b) refusing to grant its employees a prior scheduled wage increase for the purpose of discouraging their union activities and/or to undermine the Union; (c) by threatening an employee with discharge because of his activities on behalf of the Union; (d) by instituting new working conditions requiring the purchase by employees of new equipment; and (2) whether Respondent violated Section 8(a)(3) of the Act in discharging employee A. B. McCardell. The Respondent's defense is that it did not violate Section 8(a)(1) of the Act, and that it discharged A. B. McCardell for cause and not in violation of the Act.

All parties were represented, participated in the hearing, and were permitted to develop testimony concerning the issues.[2] Briefs were filed by the General Counsel

[1] The complaint and notice of hearing were filed on December 28, 1962, and an amendment to complaint and order rescheduling hearing were filed on March 5, 1963

[2] At the outset of the hearing, counsel for Respondent outlined the following procedural steps that had been taken prior to the hearing. The charge was filed November 14, 1962,

and the Respondent on April 11 and 15, 1963, respectively, and they have been carefully considered.

Upon the entire record in the case, and from my observation of the witnesses,[3] I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a Texas corporation, maintains its office and principal place of business at Houston, Texas, where it is engaged in the business of cartage. During the 12 months preceding the issuance of the complaint, a representative period, Respondent, in the course and conduct of its operations, received in excess of $50,000 from other enterprises located in the State of Texas, which other enterprises annually perform or furnish services directly out of the State of Texas valued in excess of $50,000.[4] I find that at all times material herein, Respondent has been engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits and I find that General Drivers, Warehousemen and Helpers Local Union No. 968 (herein called Local 968 or Union) affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Background

Sometime during the week of October 1, 1962, A. B. McCardell, an employee of the Respondent and the alleged discriminatee herein, asked Nicholas Howard, business representative of Local 968, how the employees at Respondent's Houston, Texas, plant could secure representation by the Union. Howard told McCardell how this was done and the latter arranged the first organizational meeting of the employees which was held on October 11, 1962. At this meeting, McCardell was unanimously selected by all employees in attendance as their chief spokesman. The 14 employees at the meeting were asked by Howard who they should have as an individual leader for him to contact. Their reply was, "McCardell has got us all down here and we trust him and we think he'd be the man for you to contact."

Following the meeting of October 11, Local 968 sent a telegram to the Respondent addressed to its president, Henry Hahn, advising that it represented a majority of Respondent's truckdrivers naming the 14 employees, the first name of which was A. B. McCardell, as having made application for membership. This telegram was followed by two letters from Local 968, one of which reiterated the information contained in the telegram and the other added two names to the prior list.

Local 968 filed a petition in Case No. 23–RC–1988 on October 15, 1962, seeking certification as the bargaining representative of all employees employed by the Respondent at its Houston, Texas, establishment. The election was held on December 14, 1962, and on December 26, 1962, Local 968 was certified as the representative. The discharge of McCardell, one of the issues in this case, took place on November 13, 1962, almost the midpoint of the organizational drive of Respondent's employees.

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and the original complaint and notice of hearing issued December 28, 1962. Respondent filed a motion for more definite statement on January 4, 1963. General Counsel responded to Respondent's motion for more definite statement on January 7, 1963. General Counsel filed a motion for judgment on the pleadings on February 27, 1963 Respondent filed a motion to quash General Counsel's motion for judgment on the pleadings on February 28, and the same day also filed a motion to stay unfair labor practice proceedings, which at that time were set for March 5, 1963. The Regional Director issued an amendment to complaint and order rescheduling hearing on March 5, 1963. Trial Examiner Thomas S. Wilson denied the motion for more definite statement by telegram dated March 6, 1963. Respondent filed interrogatories on March 8, 1963, and on March 11, 1963, Respondent filed its answer to original and amended complaints. On March 1, 1963, Respondent was notified by letter that the General Counsel had inadvertently failed to forward Respondent's motion for more definite statement to the Chief Trial Examiner. I denied the motion to stay and the request for interrogatories at the start of the hearing.

[3] The witnesses were sequestered, on motion of counsel for Respondent, at the start of proceedings.

[4] After first contesting these commerce facts, Respondent stipulated to their accuracy.

The 8(a)(1)

As noted above, some 14 employees of Respondent attended an organizational meeting on the evening of October 11, 1962. On the following morning of October 12, 1962, Respondent's president, Hahn, called employee Nathaniel Patrick into his office, and, according to the credited testimony of Patrick, informed Patrick he had seen his name on the telegram from Local 968 and told Patrick in substance that he (Hahn) could be of help whereas Local 968 could not. Hahn said, "The Union is not going to help matters. . . ."

During the week of October 14, 1962, Hahn admittedly asked employees Rufus Leslie and Patrick and Willie Smith in a warehouse as to why they had commenced the organizational drive and asked who was the instigator.[5] Employee James Davison later came into the discussion and testified that Hahn, ". . . called me over and asked me what was I griping about and I told him I didn't have any gripes and he keeps on and says, 'you must have a gripe, rumors are going around.' I said I didn't have anything to say. So, he kept on and I told him that I didn't agree on what he was doing." His credited record testimony is as follows:

> Q. What did he say?
> A. He said—told me to state my reasons. And I told him the way he was treating us and what with working night and overtime——
> He told me that I couldn't cut him out of business.
> I said I didn't try.

Again during the week of October 14, 1962, according to the credited testimony of employee Leslie, Hahn talked to Leslie in front of the warehouse asking him, "Rufus, why don't you try to talk to those guys and try to get them to forget about the Union?" Leslie replied, "Well, Mr. Hahn, I can't tell those fellows to do or nothing. I don't know what they want to do" [6]

Hahn again talked to Leslie in front of the warehouse some "2, 3, or 4 days after that" at which time he asked Leslie, "Did you talk to those fellows?" Leslie replied, "No, sir. Mr. Hahn, those fellows wouldn't even talk to me about this." To this Hahn said, "This is just a bunch of crap. One of these days you fellows might be sorry." [7] Finally, again according to the credited testimony of Leslie, Hahn talked to him on November 2, 1962, in the presence of A. B. McCardell and Clinton Denkins. Following instructions of the dispatcher, these three went to the office to get their checks from Hahn. He handed them over and said, "Well, you guys know that you got this union roused up. There is going to be some nut cutting going on and you know who it is going to be." [8]

The Wage Increase

A year earlier at an employee meeting in November 1961, Hahn admittedly promised the employees two wage increases. One increase was to become effective the early part of 1962 and the other sometime in November 1962. According to Hahn, the second increase would take effect only if business and the economic situation of the Company made it "justifiable or possible." The employees received the promised raise in February 1962, but did not receive the promised raise in November 1962. Hahn testified that the reason the November raise did not take effect was that business conditions did not warrant it. During the hearing, Respondent attempted to show through a purported profit-and-loss statement that it had experienced economic loss at this period. However Leslie testified without contradiction that Hahn told him and Patrick in October 1962, "Now, I am going to tell you guys the reason that I can't give you all the other raise like I was supposed to. On account of the Union—if it hadn't been for the Union, you'd get your other raise." It is also noted that the purported profit-and-loss statement produced by the Respondent showed that the raise given in February 1962, was given in spite of the fact that Respondent had a net loss during that period. I credit Leslie and find the raise promised for November 1962 was not given "on account of the Union."

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[5] Leslie credibly testified that Hahn asked them, "Say, what is all this stuff I hear going on here about the Union? Who's the head knocker?"

[6] Hahn denies this conversation but I believe he was mistaken.

[7] Hahn also denies this conversation but again I believe he is mistaken

[8] Hahn does not remember this conversation. McCardell corroborated Leslie.

Rules and Regulations

Respondent compiled a set of 10 rules, dated it January 21, 1963, and distributed it to the employees sometime in February 1963. This, admittedly, was the first time that company policies had been reduced to writing.

Rule (7), an admitted new rule, is:

> Drivers are expected to report to work wearing clean clothing, a chauffeur cap or ball cap and black safety-toe shoes. All employees are expected to furnish, at their own expense, safety shoes by February 15, 1963.

Respondent purported to base this rule on a high percentage of foot injuries sustained by its employees and on a recommendation by its insurance carrier that such a rule be put in effect. Respondent was asked at the trial to show its personnel injury files and the recommendation of the carrier but did not do so. And no evidence was adduced of foot injuries which would have been avoided with the use of safety-toe shoes, the reason for the rule stands unsupported in the record except for the statement itself giving the reason. It is also noted that the cost of a pair of safety-toe shoes ran as high as $15.95.

Rule (10), testified to as an "old rule" by Hahn, and about which more will be said under the 8(a)(3) portion of this case below, is:

> Each driver, upon completing work for the day and when told by Supervisor that he is finished for this day, will remove tarpaulin and any other accessories from truck, park truck in its assigned parking space, and put key on hook in warehouse.

Work Records

On October 17, 1962, Hahn called McCardell into his office and questioned him about incidents which had occurred the past July and August and early part of October.[9] The General Counsel presented other evidence of employees, after joining the Union, being called into Hahn's office and questioned regarding old work incidents in which they were involved. The complaint, as amended, does not include this conduct in the case and no finding nor credibility determination will be made regarding it although the brief of the General Counsel does allude to it.

Conclusions

The relevant provisions of the Act are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> SEC. 8. (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

Based upon the credited testimony set out above, I find that Respondent interfered with, restrained, and coerced its employees in violation of Section 8(a)(1) by the following acts: telling Patrick on the morning following the Union's organizational meeting that he, Hahn, could help him but that Local 968 could not and that "the Union is not going to help matters"; questioning employees Leslie, Patrick, and Smith in a warehouse during the week of October 14, 1962, as to why they had commenced the organizational drive, asking them who the instigator was, and forcing questions as to employee gripes on Davison; asking Leslie, during the same period, to "try to talk to those guys [employees] and try to get them to forget about the Union"; again asking Leslie, some 2 to 4 days later, "Did you talk to those fellows?"

[9] The incidents involved will be more fully discussed below under the 8(a)(3) part of the case.

and threatening him with the remark, "One of these days you fellows might be sorry"; on November 2, 1962, telling Leslie, McCardell, and Denkins, "Well, you guys know that you got this union roused up. There is going to be some nut cutting going on and you know who it is going to be"; and refusing, "on account of the Union," to give the promised raise in November 1962.[10]

The brief of the General Counsel argues, in effect, that the "company rules and regulations" distributed in February 1963 were issued in retaliation of the union activities of its employees and hence interfered with their rights under Section 7 of the Act. The brief pointed out that this was the first time company policies had been reduced to writing, and that rule 7 providing for safety-toe shoes was a new rule and cost employees up to approximately $16 per pair. It was also duly noted that Respondent did not put in evidence facts which it said it had which justified the rule; the inference being that the facts, if presented, would not support the action taken.

But I see nothing in the record tending to connect the issuance of these rules with the coming of the Union nor with the Respondent's antiunion conduct during the organizational period. The closest occurrence of any possible antiunion conduct was almost 2 months away at the time of the election. The antiunion conduct set out above covered the period of the organization drive of about 2 months' duration. Thereafter nothing occurred in another 2-month period. The rules themselves are logical and reasonable. And they apply to all employees; not just to union adherents. There is nothing in the record to link up the issuance of the rule with antiunion conduct except the timing of the rule. As the timing follows a period of 2 months' quiet, it stretches reason to say in this case, without more evidence, that the issuance of the rules was based on antiunion motives. Accordingly I find that the General Counsel has not sustained his burden of proof as to the issuance of the rules and regulations and will recommend that this issue in the complaint be dismissed.[11]

Additional 8(a)(1)

The amended complaint charged Respondent with threatening an employee with discharge because of his activities on behalf of the Union.[12] This relates to December 14, 1962, and the time of day was immediately after the election. According to Davison's testimony, Hahn walked out of his office and told the group of truckdrivers, "The union won 14 to 11 . . . . But that don't mean that you'll tromp on me." Then he asked Davison, ". . . what was I doing on the 700 block of Broadway in the truck, and I told him I was putting water in the radiator and he said I was a liar." Davison testified that Hahn turned and walked back to the office but on the way told Terrell, the dispatcher, to watch Davison and tell Hahn everything he did because Davison would be the "first son of a bitch he'd fire."

Hahn's testimony of what happened immediately following the election was,

> I went out myself. I wanted them to hear it from me that the union had won by 14 to 11 and I said, "Now, let's get to work."

He denied making the statement that the election results did not mean the employees could "tromp on me," and he could not recall talking to Davison on the way into the office. He also denied telling the dispatcher to watch Davison because he would be the first to be fired.

It is not surprising that Hahn did not recall or could deny much of Davison's testimony. Hahn impressed me as a person easily angered but one who quickly got over his anger and forgot the incident. He could have said the things testified to by Davison and then forgotten them. I credit Davison and find that Hahn did come out of his office and tell his drivers that the Union had won the election and that this did not mean in effect that the drivers could ignore or disobey his orders. I also credit Hahn and find that he told the drivers to "get to work." This, however, is management's right in running the business and is in no way a violation of the right of the employees to engage in concerted or union activities.

I also credit Davison and find, in the same conversation with the announcement of the Union's victory at the polls, Hahn told his dispatcher to keep his eye on Davi-

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[10] See *N.L.R.B.* v *Ziegler, Inc*, 298 F 2d 671 (C.A. 5); *N.L.R.B.* v. *Duval Engineering & Contracting Co*, 311 F. 2d 291 (C.A. 5).

[11] The complaint refers to the "unilateral" issuance of the rules. As the word "unilateral" has connotations in the area of bargaining, the record was made clear that Respondent was not being charged with a refusal to bargain in good faith with the Union over terms and conditions of employment. As employers must be able to issue reasonable and necessary rules in order to carry on their business, such "unilateral" actions in and of themselves are not violative of Section 8(a)(1) of the Act.

[12] Paragraph 7(d) of the amended complaint.

son as he was the "first son of a bitch he'd fire." This, to all interests and purposes, linked Davison to the Union's victory and the employees could reasonably have understood it to be, in effect, a threat of discharge because Davison had engaged in this protected activity. The employees knew of the occasion during the week of October 14 when Hahn had questioned Davison as to the reasons for the Union's organizational drive and knew that Hahn had told Davison he could not "cut him out of business." Accordingly, as this threat to watch an employee so as to get something on him in order to fire him would interfere with the employees' rights to join a union, Respondent violated Section 8(a)(1) of the Act in making the threat. Further, since Hahn used the word "first," it is reasonable for the employees to expect a "second" and perhaps more discharges resulting from a more strict observance of work habits brought on by union activities. This also interferes with, restrains, and coerces employees in exercising their rights under Section 7 of the Act. It is conduct which would not be started but for this union activity and hence it is retaliatory in motive and coercive.

When Day is Done

> (10) Each driver, upon completing work for the day and when told by Supervisor that he is finished for this day, will remove tarpaulin and any other accessories from truck, park truck in its assigned parking space, and put key on hook in warehouse.

The above is quoted from the company rules and regulations dated January 21, 1963, and distributed in February 1963.

Some witnesses for the General Counsel testified that when they were through for the day they always were told by the supervisor to park the truck, lock it up, and bring in the tarpaulin.[13] Davison, on cross-examination, testified, credibly, that Hahn never told him of rule 10 saying, "He didn't give me no rules." He also testified "[that if the dispatcher told him] that was it, check the board. I'll see you tomorrow." "I'd know to lock up. . . ." because "I knew I was through." As an exception to this line of testimony, Patrick testified that he had left work early, leaving the keys in the truck, and the next day would find the keys on the board in the warehouse and the truck where he had left it.

Respondent's witnesses testified that there was a company rule to park and lock up trucks and remove and store the tarpaulins when the day's work was done without being specifically told. But the supervisors did corroborate in part the General Counsel's witnesses by testifying that, on occasion, they did tell the drivers specifically to park, lock up, and bring in the tarp.[14]

The drivers may not have understood that Respondent had a "rule" about parking, locking up, and removing the tarpaulins at close of day but it is abundantly clear from the record that they did this It matters not, so far as a "rule" is concerned, that most of the time they were specifically told in effect to do these things. These drivers impressed me as being men who rarely if ever were given any discretion in performing their work tasks, and Respondent could have been operating from an abundance of caution by telling them to lock up, etc. I find that Respondent did have an unwritten rule for drivers to park their trucks, lock them up, and remove the tarps *when they were through for the day*. I also find that Respondent's supervisors generally specifically instructed each driver, in effect, to do these things with their trucks.

The 8(a)(3)

McCardell was discharged on Tuesday, November 13, 1962, at 10 a.m. Hahn told McCardell that "he left his truck parked away from the assigned area, that the keys were in the ignition and that the tarpaulin was in the truck and that he was discharged."

McCardell was first employed by the Respondent as a truckdriver on December 15, 1959. He drove a bobtail truck and his duties consisted in the main of picking up and delivering small orders. This type of work was not easy to schedule in advance.

November 9, 1962, was the last working day for Respondent prior to November 13, due to the intervening weekend and the holiday of November 11. McCardell had just completed a delivery run at approximately 12:30 p.m. on November 9, 1962. Finding no parking space available at Respondent's place of business he had parked his truck approximately 50 feet from Respondent's establishment in front of the Corey Supply Company. This was not an unusual occurrence. He turned in his

[13] Truck keys and tarpaulins were kept in the locked warehouse

[14] Hahn testified he did not know how many times he did not say "lock up" to a driver finishing his day's work.

receipts to the dispatcher, Terrell, and was told to take an hour for lunch. About 2 minutes later, Terrell called McCardell back into his office and told him he was through for that afternoon. Since November 9, 1962, was a payday, Terrell gave McArdell his weekly paycheck and told him "you can be off." McCardell admitted that when he was given his weekly paycheck he knew he was through for the day.[15] Upon receipt of the check, McCardell left the premises.

About 3 p.m. on the same afternoon, employee Price noticed McCardell's truck parked in front of the Corey Supply Company and commented about it to Dispatcher Terrell. Price, under instructions from Terrell, then parked the truck in the slot and put the tarp in the warehouse. The keys were in the truck and the tarpaulin was on the open bed of the truck.[16] McCardell testified that he did not park his truck and bring in the keys and the tarp because he thought the truck might be used again that afternoon. This sounds like an afterthought. Each truckdriver has a truck[17] and seemingly no one would be available to drive McCardell's. Additionally, if the truck were to be reused that would be the privilege and responsibility of Respondent to supply the keys and the tarp and the driver. This is no concern of the regular driver. This is a weak excuse by McCardell for failing to do what he regularly had been doing when he knew he was through for the day. The company rule was violated.

Hahn overheard Terrell talking to Price about McCardell's truck being parked by Corey Supply Company. He then investigated the incident, and, in the words of witness Moore, said,

> "That's a hell of a note for a guy to run off and leave his truck." He said, "He [McCardell] thinks cause he got the union going on he can do anything he wants to, but I've got news for him."

When McCardell thereafter called Hahn on Monday, November 12, 1962, to find out when he should report to work, Hahn instructed him to come to the office at 10 a.m. the following day.

Accordingly, at 10 a.m. on Tuesday, November 13, 1962, McCardell went to Hahn's office. Present, in addition to Hahn, were Terrell, Doug Ford, and Hahn's son, Corky. Hahn told McCardell that when he clocked out on November 9, he left his truck parked away from the assigned area, with the keys in the ignition and the tarpaulin on the open back. And with that he was discharged. Hahn testified that he had warned McCardell previously.

The Warning

On October 17, 1962,[18] at the end of the day, McCardell was called into the office of Hahn and warned about his "frequency of accidents, incidents involving truck, and personal injuries." A written report was made of this and was introduced in evidence as Respondent's Exhibit No. 4. Vice President Sampier witnessed the report. Under the heading "Remarks" appears the following, "Final warning, next incident will be discharged [sic]." Under the heading, "Description of Circumstances," appeared the note "(see file)."[19]

Hahn testified as to the following circumstances as they appeared in the personnel file of McCardell:

1. May 1, 1962—a bed was lost.
2. July 11, 1962, lift gate on McCardell's truck damaged.
3. July 5, 1962, McCardell bumped his knee on the truck.
4. July 27, 1962, shortage of goods.
5. August 23, 1962, shortage of goods.

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[15] There is a sharp conflict as to whether McCardell was being excused from work for the afternoon after he had requested the afternoon off, as testified to by Respondent's witness Terrell, or whether he was summarily excused from work As McCardell admitted that he knew he *was through for the day,* it is immaterial whether he had or had not requested the afternoon off.

[16] There was conflicting testimony as to whether the truck was used again that afternoon. This likewise is immaterial. The important fact is whether the driver was *through for the day*

[17] Testimony of Davison for the General Counsel and Price for the Respondent

[18] McCardell places the date of this meeting as October 24, 1962. However, as Respondent's Exhibit No. 4 bears the date of October 17, and as Sampier appeared to have witnessed the interview on October 17, 1962, and as Hahn testified that he was out of town on another engagement on October 24, 1962, I find the meeting to have occurred on October 17, 1962.

[19] Apparently the reference, "(see file)," related to McCardell's personnel file.

6. August 16, 1962, shortage of two cases of wine.
7. August 17, 1962, McCardell got a nail in his foot. (Comment: but McCardell testified he reported for work at the regular time on August 20. Company records show that he was scheduled to work on August 20, but did not report. Hahn testified that he did not reprimand McCardell for not showing up on August 20 That is he gave him no written reprimand. But he said he "probably did" talk to McCardell although he was not sure of this.)

As to the above incidents McCardell denied No. 1 and Hahn did not know what happened; Hahn testified that he had made no determination of fault as to incidents No. 2 through No. 5; and McCardell denied fault as to No. 6 but paid for the two cases.

Even earlier incidents were testified to by Hahn to which comments were made by McCardell as follows: On October 17, 1961, McCardell allegedly ran off the road and caused over $300 worth of damage. McCardell denied this. On December 1, 1961, McCardell was four cases of whisky over rather than short.[20] On March 9, 1962, Hahn received a report that he had better watch some of his boys including McCardell who were picking up beans and rice at the port. McCardell was specifically asked if he did this to which he replied, "No, sir." This was consistent with what he had told Hahn when Hahn had investigated the case originally.

Finally bringing the record up to date, Hahn, on direct examination, testified that on October 8, 1962, McCardell had an accident with his truck at the Port Commission. He had parked his truck approximately 25 feet north of the Port Commission on a slight incline, had turned off the ignition, and had put the truck in gear. While he was in the office, the truck rolled forward down the incline and into the building causing approximately $200 damage. The Port Commission wrote the Respondent on October 8, 1962, putting it on notice for liability. McCardell testified that the brakes on the truck were defective and although he had reported this to Respondent, the brakes had not been fixed and that was why the truck rolled down the incline. Hahn did not talk to McCardell about this accident. The record showing Hahn's testimony on this point is as follows:

Q. Did you talk to McCardell about this?
Let me rephrase my question.
Pursuant to this accident, did you give Mr. McCardell any warning notice?
A. Oh, yes.

The Respondent's Record of Discharge

Hahn, on direct examination, could not remember putting anything in the personnel file for McCardell other than the record of reprimand of October 17, 1962. When asked if he could remember whether he put anything in the file, he replied as follows:

The WITNESS [Hahn]: Other than the record of reprimand, I put in the file. And then I told McCardell, [on the day of the discharge] I said, "now, Mac," I said, "if you don't want your paycheck, I can't make you sign for it, but I'm going to keep it and you'll have to see me before you can get your check."

Respondent introduced into evidence as its exhibit No. 5, a document purporting to be a record of McCardell's discharge, witnessed and dated on November 13 at 10:15 a m. It related to McCardell's activities on November 9, 1962, at 12:30 p.m. and the material typed in the record is as follows·

Knock off at 12:30 p.m. Upon receiving his weekly paycheck he left the job. Guilty of the following violations of standard company rules.
1. Left key in truck
2. Left truck tarpaulin in truck, whereas it should have been put in warehouse, which is the usual thing to do.
3. Failed to put truck on parking lot, prior to leaving work.

[20] There was a mixup over four cases of whiskey. From Hahn's testimony McCardell, while trucking for the Lone Star Company, picked up a shipment at Lone Star's warehouse and delivered it to Ralston Drug Company. This contained four cases of whiskey too much and the four cases had to be returned to Lone Star. But they were never returned The checker at Ralston Drug claims that he put the four cases back on the truck to be returned to Lone Star. McCardell and Hahn together went to talk to the warehouseman Later on Hahn paid for, and McCardell took, a lie detector test but the results were inconclusive.

McCardell testified that when he was discharged on November 13, 1962, he was asked to sign a white piece of paper, which he did not recognize. The following matter taken from the direct testimony of Hahn is his version of the story:

Q. Mr. McCardell said that you asked him to sign something before you would give him his check.
A. I did.
Q. What was it that you asked him to sign?
A. I had his check on the payroll.
Q. You asked him to sign the payroll record?
A. Right.
Q. Is that an ordinary and customary thing? It's done every——
A. Done every week.
Q. Has he done that every week?
A. Yes, he has.
Q. And all the other employees have done that every week?
A. Yes.
Q. And he refused to do so?
A. Yes.
Q. Did he say anything else?
A. No, he didn't.

Hahn's testimony that he was trying to give McCardell his check on November 13, and get him to sign the payroll record at that time was contradicted by Respondent's own exhibit No. 5. The exhibit relates that McCardell received his weekly paycheck on November 9. McCardell was unable to identify the piece of paper Hahn wanted him to sign and no finding will be made on it, but it is clear that Hahn was confused in his testimony and could not have been trying to give McCardell his weekly paycheck on November 13, 1962. I find as testified to by McCardell and Respondent's other witnesses, and as noted by Respondent's Exhibit No. 5, that McCardell had received his paycheck on November 9, 1962, before he left the job.

McCardell had not been reinstated at the time of the hearing.

Concluding Findings

Respondent maintains that McCardell was discharged for violating the rule about locking up his truck, hanging up the keys, and storing the tarpaulin when he was through for the day. General Counsel maintains that this is merely a pretext with the real reason for his discharge being his union activities and such a discharge violates Section 8(a)(3) of the Act as it discourages membership in labor organizations.

However, the Act does not circumscribe an employer's right to hire, discipline, or discharge an employee for reasons not forbidden by the Act, even though the employee may be an active union adherent or advocate. The employer may hire and fire at will, so long as the terms of the statute are not violated.[21]

> . . . management is for management. Neither Board nor Court can second-guess it or give it gentle guidance by over-the-shoulder supervision. Management can discharge for good cause, for bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with but one specific, definite qualification: it may not discharge when the real motivating purpose is to do that which Section 8(a)(3) forbids.[22]
>
> The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation . . . .[23]

The burden to make out a case of discrimination by substantial evidence rests continuously on the General Counsel,[24] and substantial evidence is such evidence as affords a substantial basis of fact from which the fact in issue can be reasonably inferred.[25]

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[21] *N L R B.* v. *Electric City Dyeing Co.*, 178 F. 2d 980, 982 (C.A. 3), and cases cited therein.

[22] *N.L R B.* v. *T. A. McGahey, Sr., et al., d/b/a Columbus Marble Works*, 233 F. 2d 406, 413 (C.A. 5). See also *N.L.R B.* v. *Hudson Pulp & Paper Corporation, etc.*, 273 F. 2d 660, 666 (C A. 5).

[23] *N L R B* v. *Jones & Laughlin Steel Corporation*, 301 U.S. 1, 45–46; 57 Sup. Ct. Rep. 615, 628 (1937).

[24] *N.L.R B.* v. *Brady Aviation Corporation*, 224 F. 2d 23, 25 (C.A. 5)

[25] *N.L.R.B* v. *Columbian Enameling & Stamping Co., Inc.*, 306 U S. 292, 299.

As set out above, the General Counsel has established by a preponderance of the credited evidence that Respondent's president, Hahn, immediately upon receiving the telegram that 14 named employees had applied for membership in the Union, embarked on a course of conduct reasonably designed to cause the employees to give up their desires for union representation in violation of the Act. He told Patrick, "the Union is not going to help matters" but that he, Hahn, could be of help. He questioned Leslie, Patrick, and Smith in a warehouse the same week as to why the employees wanted a union and asked who started it. He then insisted that Davison tell him his "gripes" and when he was told he said Davison ". . . couldn't cut him out of business." [26] During the same week Hahn tried to enlist Leslie on his side to ". . . talk to [the employees] and try to get them to forget the Union." He followed up on this a few days later by asking Leslie, "Did you talk to those fellows?" He then concluded with the threat, "One of these days you fellows might be sorry." Finally 2 weeks later on November 2, 1962, he accused Leslie, McCardell, and Denkins of having gotten "this union roused up." And in effect told them there would be some hardships practiced against some of them and "you know who it is going to be." The record shows that McCardell instigated the Union and was selected by the employees to be their spokesman with the Union. His was the first name on the list of the 14 employees who had applied for union membership and since Hahn had been trying so hard to find out who the "head knocker" was and as there was no attempt made for secrecy it is concluded that he did find out that McCardell was the most active union adherent. His remark, related by Moore, on November 9, 1962, that "He [McCardell] think cause he got the union going on he can do anything he wants to, but I've got news for him," completely establishes his knowledge that McCardell "got the union going."

Six days after McCardell had called the employees to the first union meeting, he, McCardell, was called into the office and for the first time in 3 years of employment was formally reprimanded for incidents going back as far as a year. Incidents, most of which were not determined even to be his fault. He was warned that the next incident would lead to discharge. The ostensible reason for this interview was the incident when his parked truck ran into the Port Commission. But there are two points tending to establish the fact that this is a sham seized upon by Hahn to set up a "record" so as to fire this employee. The first point is that Hahn knew about this Port Commission accident 4 days before he knew about the Union yet did nothing about it. Further it was another 5 days before he had the interview. He had a small number of employees and worked with them daily, but gave no reason why he delayed the interview. Reason would dictate more promptness if in fact the accident were considered serious. The second point is that McCardell allegedly ran off the road causing $300 damages a year earlier yet nothing was done then but now, after the coming of the Union, a $200 damage claim becomes critical leading to the first written reprimand of the driver. (The only evidence that this was a written reprimand is that it was introduced in evidence as such. McCardell denied, without contradiction, ever getting a copy of a written reprimand.)

With this as background, we come down to November 9, 1962, when McCardell violated the company rule to park the truck and bring in the keys and tarp when he was through for the day. Without even considering the evidence that employees were usually specifically told to do these things yet he was not told that day, it seems clear to me that the General Counsel has established by a preponderance of the evidence that Respondent seized on this opportunity as a pretext to rid itself of the most active union member and fulfill its prophecy that "you know who it is going to be." Threats or warnings of reprisals for union support are factors in finding that a discharge was discriminatory and not for cause.[27] I find that Respondent discriminatorily discharged McCardell in order to discourage membership in the Union, and has refused to reinstate him, in violation of Section 8(a)(3) and (1) of the Act. I find that Respondent seized upon the apparent violation of a rule as a pretext to rid itself of this union leader.

The Rule

At the outset of the hearing, Respondent's counsel invoked the rule and pursuant thereto the Trial Examiner sequestered the witnesses permitting the General Counsel to keep with him at all times the 8(a)(3) and the Charging Party and permitting the Respondent's counsel to keep with him President Hahn. During examination

[26] Compare *Stuart F. Cooper Co.*, 136 NLRB 142.

[27] *International Trailer Company, Inc. & Gibraltar Industries, Inc.*, 133 NLRB 1527 (1961). See also *Wrought Originals, Inc.*, 139 NLRB 1435 (1962); and *Trumbull Asphalt Co. of Delaware*, 136 NLRB 1461, enfg. 314 F. 2d 382 (C.A. 7).

of witnesses for General Counsel, Vice President Sampier entered the hearing room but left after his presence had been brought to the attention of Respondent's counsel. However, Sampier reentered the room when Respondent began its case and remained throughout the direct examination of Respondent's president and most of the cross-examination. He was called later as a witness on behalf of Respondent. At this point General Counsel objected to any testimony being elicited from Sampier because of this breach of the rule. Respondent's counsel interpreted the rule to the effect that he was entitled to have someone sit with him at counsel table while he was examining his own witness who had previously sat with him throughout the trial. This view is erroneous.

It is apparent that the reason for the rule to invoke sequestration of witnesses is to permit each witness to testify on a clean slate without having first heard testimony of previous witnesses. It should likewise be pointed out that it lies within the sole discretion of the Trial Examiner to grant or not grant a motion for this rule. In the instant case, the General Counsel and the Respondent's counsel were instructed to police the rule themselves as the Trial Examiner had no knowledge of who might be called as witnesses. There is no question but what the spirit of the rule was broken when Respondent's vice president, a future witness, sat in the hearing during the testimony of Respondent's president. However, I am convinced that this was not done willfully by the Respondent's vice president but was done through the erroneous view that Respondent's counsel was entitled to have someone with him even while he interrogated his own witness, the one who had sat with him through the entire proceedings up to that time. Inasmuch as the Trial Examiner, in his discretion, could have permitted the vice president to have sat with counsel while he interrogated the president had a request been made for this purpose, I now in the exercise of my discretion permit the testimony of the vice president to remain in the record. However it is noted that as he was permitted to listen to previous testimony of Respondent's witness, this fact has been duly weighed in evaluating his testimony.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in unfair labor practices violative of Section 8(a)(1) and (3) of the Act, I shall recommend below that it cease and desist therefrom and take certain affirmative actions designed to effectuate the policies of the Act.

The Respondent's unfair labor practices strike at the heart of the rights guaranteed employees by Section 7 of the Act.[28] The rights involved are closely related to other rights guaranteed by Section 7. Because of the nature of the unfair labor practices found above, there is reasonable ground to believe that Respondent will infringe upon such other rights in the future unless appropriately restrained. Therefore, in order to make effective the interdependent guarantees of Section 7, I shall recommend an order below which will have the effect of requiring the Respondent to refrain in the future from abridging any of the rights guaranteed employees by Section 7.[29]

Having found that Respondent has discriminatorily discharged and refused to reinstate A. B. McCardell, I will recommend that Respondent be ordered to offer him immediate and full reinstatement to his former or substantially equivalent position, and make him whole for any loss of earnings he may have suffered because of the discrimination against him, by payment to him of a sum of money equal to the amount of wages he would have earned from the date of the discrimination to the date of the offer of reinstatement, together wih interest thereon at the rate of 6 percent per annum, and that the loss of pay and interest be computed in accordance with the formula and method prescribed by the Board in *F. W. Woolworth Company*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716, to which the parties hereto are expressly referred.

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[28] *N.L.R.B.* v. *Entwistle Mfg. Co*, 120 F. 2d 532 (C.A. 4).

[29] *May Department Stores d/b/a Famous-Barr Company* v. *N.L.R.B.*, 326 U.S. 376; *Bethlehem Steel Company* v. *N.L.R.B.*, 120 F. 2d 641 (C.A.D.C.).

CONCLUSIONS OF LAW

1. The Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Charging Party is a labor organization within the meaning of Section 2(5) of the Act.
3. By coercively telling an employee that the Union is not going to help matters, by interrogating employees as to why they have commenced the organizational drive, by asking them the name of the instigator and forcing questions as to employee problems on an employee, by asking an employee to work against the Union and in favor of the Respondent, by following up on this request and threatening him with the remark that one of the employees might be sorry, by threatening to cut someone off because of the advent of the Union, and by refusing to grant a promised raise because of the union activities of the employees, Respondent interfered with, restrained, and coerced its employees in the exercise of their rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act.
4. By discharging employee A. B. McCardell because of his union activities, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.
5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.
6. A preponderance of the evidence does not support allegations in the complaint that Respondent violated Section 8(a)(1) of the Act except in the respects above found.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, I hereby recommend that the Respondent, Longhorn Transfer Service, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating employees about union activities or sympathies in a manner constituting interference, restraint, or coercion in violation of Section 8(a)(1) of the Act.

(b) Enlisting the aid of employees to work against the Union and in favor of the Company.

(c) Threatening employees with loss of jobs because of their union activities.

(d) Discouraging membership in General Drivers, Warehousemen and Helpers Local Union No. 968 affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization of its employees, by discharging its employees because of their concerted or union activities, or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of employment.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to form labor organizations, to join or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from engaging in such activities.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Offer A. B. McCardell immediate and full reinstatement to his former or substantially equivalent position, without prejudice to all rights and privileges to which he is entitled.

(b) Make whole A. B. McCardell in the manner set forth above in the section entitled "The Remedy."

(c) Preserve, until compliance with any order for reinstatement or backpay made by the Board is effectuated, and, upon request, make available to the Board and its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records relative to a determination of the amount of backpay due and to the reinstatement and related rights provided under the terms of any such order.

(d) Post at its place of business in Houston, Texas, copies of the attached notice marked "Appendix."[30] Copies of said notice, to be furnished by the Regional

[30] If this Recommended Order is adopted by the Board, the words "A Decision and Order" shall be substituted for the words "The Recommended Order of a Trial Examiner" in the notice. If the Board's Order is enforced by a decree of a United States Court of

Director for the Twenty-third Region, shall, after being signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for the Twenty-third Region, in writing, within 20 days from the date of the receipt of this Intermediate Report, what steps Respondent has taken to comply herewith.[31]

It is further recommended that the complaint be dismissed insofar as it alleges violations of Section 8(a)(1) of the Act, except as herein specifically found.

Appeals, the notice will be further amended by the substitution of the words "A Decree of the United States Court of Appeals, Enforcing an Order" for the words "A Decision and Order."

[31] If this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for the Twenty-third Region, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the Labor Management Relations Act, we hereby notify our employees that:

WE WILL NOT interrogate our employees about their union activities or sympathies in a manner constituting interference, restraint, or coercion in violation of Section 8(a)(1) of the Act.

WE WILL NOT enlist the aid of employees to work against a union and in favor of the Company.

WE WILL NOT threaten employees with loss of jobs because of their union activities.

WE WILL NOT discourage membership in General Drivers, Warehousemen and Helpers Local Union No. 968 affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization of our employees, by discharging employees because of their concerted or union activities, or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from engaging in such activities.

WE WILL offer immediate and full reinstatement to A. B. McCardell, and we will make him whole for any loss he may have suffered as the result of the discrimination against him.

All our employees are free to become or remain, or to refrain from becoming or remaining, members of the above-named or any other labor organization.

LONGHORN TRANSFER SERVICE, INC.,
Employer.

Dated_____ By_____
(Representative) (Title)

NOTE.—We will notify the above-named employee if presently serving in the Armed Forces of the United States of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 6617 Federal Office Building, 515 Rusk Avenue, Houston 2, Texas, Telephone No. Capitol 8–0611, Extension 271, if they have any question concerning this notice or compliance with its provisions.